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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

## No. 352

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA,

*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

## PETITION FOR REHEARING.

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October 24, 1941.

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*Petitioners,*

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THE UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR REHEARING.

COME now the petitioners in the above entitled proceeding and petition the Court to grant a rehearing therein and in support of said petition show as follows:

On August 6, 1941, petitioners filed a petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, affirming a judgment of conviction rendered against petitioners after trial and verdict by the United States District Court for the Northern District of Indiana in a criminal prosecution for conspiracy in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Law. On October 13, 1941, this Court entered its order denying said petition.

In addition to the matters presented in our original petition, there is one consideration not heretofore explicitly urged which petitioners feel in duty bound to present to the Court. Briefly set forth it is as follows:

The Government has instituted against these petitioners a civil suit in equity, based in large part upon the same transactions as those involved in the instant criminal prosecution, seeking to divorce General Motors Acceptance Corporation from General Motors Corporation, and the time to answer, plead or move therein has been extended for the purpose of awaiting the final decision in this case. (See our original petition, page 16, note 37.) The applicable statutes confer upon the defendants in that suit (petitioners here) a right of appeal from the District Court directly to this Court.[1]

Under the doctrine of *res judicata*, however, denial of the writ in the instant case will apparently preclude consideration on the merits of the issues presented in the civil action to the extent that they are the same as the issues determined by the courts below herein. *Oklahoma* v. *Texas*, 256 U. S. 70, 85; *Local 167* v. *United States*, 291 U. S. 293, 298; *Johnson Company* v. *Wharton*, 152 U. S. 252. This will deprive this Court, *pro tanto*, of the opportunity of passing on the merits of the issues in the civil suit. In consequence, this Court will have impaired the appellate jurisdiction conferred upon it by Congress in the civil case and will have bound itself by the decision of an inferior tribunal. At the same time these petitioners will be deprived of their right to have this Court pass on the vital

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[1] Act of February 11, 1903, c. 544, §2, 32 Stat. 823, as amended by Act of March 3, 1911, c. 231, §291, 36 Stat. 1167, 15 U. S. C. A. §29; Act of March 3, 1911, c. 231, §238, 36 Stat. 1157, as amended by Act of January 28, 1915, c. 22, §2, 38 Stat. 804, and Act of February 13, 1925, c. 229, §1, 43 Stat. 938, 28 U. S. C. A. §345.

issues presented in that proceeding. We respectfully suggest that this Court should interpose its power to prevent such a result.

To the petitioners it is of no moment whether the final adjudication of such issues be made by this Court in the criminal case or in the civil suit. What is of paramount importance is that this Court should not permit its consideration of the civil case to be embarrassed by the pronouncement of an inferior tribunal and so lose its judicial freedom to exercise in all its phases the appellate jurisdiction exclusively conferred upon it by statute. It is submitted, therefore, that this Court should grant certiorari both as a matter of sound judicial administration and as a matter of respect to an Act of Congress.

In addition to the foregoing, we desire to call the Court's attention to an event of vital significance which has transpired since the filing of our petition for certiorari. On August 21, 1941, the Board of Governors of the Federal Reserve System, pursuant to the President's Executive Order of August 9, 1941 (6 Fed. Reg. 4035), adopted Regulation "W" imposing restrictions upon consumer credit (6 Fed. Reg. 4443). Under Section 4, subdivisions (a) and (b), of said regulation, extensions of instalment sale credit in connection with the purchase and sale of passenger automobiles are prohibited in cases in which the deferred balance exceeds 66⅔% of the purchase price or the maximum maturity exceeds eighteen months. Petitioners' restrictions were substantially identical (R., p. 3221). The imposition of those restrictions (as found by the Court below) resulted in restraining the interstate trade in General Motors automobiles referred to in the indictment. This constituted the precise conspiracy of which the petitioners were

convicted.[2] Petitioners are, therefore, now required by federal regulation to impose the same restrictions as those which, when imposed voluntarily, were held to constitute unlawful restraint of trade in General Motors automobiles. That the effect of the use of such restrictive means upon the trade in automobiles is identical, whether they be imposed by the manufacturer voluntarily or pursuant to Governmental regulation, is obvious. Since such restrictions have been imposed by regulation *without Congressional action suspending the operation of the Sherman Act*, it must follow that the use of similar restrictive means by private parties did not violate that statute unless the purpose sought to be achieved thereby was in itself illegal under the statute. In the instant case such purpose was not illegal. It was not and could not have been the reduction in the volume of sales of General Motors cars. It was either (as these petitioners assert) the preservation of the goodwill of the ultimate consumers of the cars by protecting them from unsound credit terms and exorbitant charges or (as the Government maintains) the acquisition by General Motors Acceptance Corporation (through such means as the Government has now itself adopted and has therefore

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[2] Referring to the Los Angeles conference held in 1925, at which the conspiracy charged was supposed to have been entered into, the Circuit Court of Appeals said (R., p. 4595):

> "Obviously the executives were looking beyond the Los Angeles situation and planning in terms of nation-wide merchandising of General Motors products. They feared that if a finance policy based on non-recourse, lower down payments and longer terms were permitted to be used by General Motors dealers in southern California, 'it would spread all over the United States and it would seriously jeopardize the whole installment plan of purchase, and we (the executives) felt, therefore, that we could not endorse that policy so far as General Motors Corporation was concerned.' Grant admitted that the Los Angeles plan of action was to be carried in any part of the country where similar circumstances prevailed."

approved as legal) of as much of the business of financing General Motors automobiles as possible (Indict. Par. 35, R., p. 10). Under either interpretation it is obvious that the intent ascribed to petitioners is not illegal under the Sherman Act.

For the above reasons it is respectfully prayed that this petition for a rehearing be granted, that, upon further consideration, the order denying the petition for certiorari be vacated and an order be entered allowing such writ.

Respectfully submitted,

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Chicago, Illinois,
Attorneys for Petitioners.

October 24, 1941.

HERBERT POPE,
HENRY M. HOGAN,
FERRIS E. HURD,
HENRY F. HERBERMANN,
Of Counsel.

I, JOHN THOMAS SMITH, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JOHN THOMAS SMITH